8:22-cv-01931-JVS-ADS
Joy Ho Scherer v. City of Los Angeles et al

**TENTATIVE Order Regarding Qualified Immunity [61, 62]**

Before the Court is the issue of whether Defendant Officers Wessam Wayne Ismail ("Officer Ismail") and Antonio Martinez, Jr. ("Officer Martinez") (collectively "Defendants") are entitled to qualified immunity regarding Plaintiff Joy Ho Scherer's ("Scherer") 42 U.S.C. § 1983 claim for her First Amendment right to petition. In February 2025, this Court adopted a briefing schedule on the issue of qualified immunity. (Briefing Schedule, Dkt. No. 60.) In accordance with that schedule, Officers Ismail and Martinez filed a supplement brief on qualified immunity, (Defendants' Br., Dkt. No. 61), and Scherer filed a response, (Scherer's Br., Dkt. No. 62).

For the following reasons, the Court find that Officers Martinez and Ismail are not entitled to qualified immunity for Scherer's 42 U.S.C. § 1983 claim for her First Amendment right to petition. Accordingly, the case will proceed.

## I. BACKGROUND

1. *Factual Allegations*

The following allegations are taken from Scherer's FAC. (FAC, Dkt. No. 17.)

On October 31, 2020, Maxwell Bravo ("Bravo") brutally beat and attempted to rape Scherer inside his second-floor apartment. (Id. ¶¶ 19, 44–47, 71.) Scherer and Bravo had an ongoing "dating relationship" at the time. (Id. ¶ 19.) Scherer fought back as Bravo ripped off her clothes and bit, punched, kicked, and struck her. (Id. ¶¶ 46-49.) Eventually, Bravo pushed Scherer outside of his apartment and left her partially naked and without any of her belongings. (Id. ¶¶ 47–48.) Bravo then opened the door, threw Scherer's belongings at her, and dragged her back inside by her hair. (Id. ¶¶ 51–55.) Scherer tried to flee down the stairs, but he again grabbed her by her hair, dragged her up the stairs, and "began beating her head against the metal railing." (Id. ¶¶ 53-54.) A witness then yelled at Bravo to stop beating her and said that the police were on their way. (Id. ¶ 55.)

When Officers Martinez and Ismail arrived at the scene, it took them approximately forty seconds to get inside the gate of the apartment building. (FAC ¶ 58.) During this time, the Officers could hear Scherer's screams. (Id.) Once the Officers entered, they saw Bravo quickly walking towards the exterior stairway leading up towards his apartment. (Id. ¶ 59.) The Officers detained Bravo near the bottom of the stairs and found Scherer standing at the landing on the top of the stairway leading down to the first floor. (Id. ¶¶ 60-62.)

At the time, Scherer was "crying and obviously beaten and bloody." (Id. ¶ 62, 64.) She had observable wounds, including "a bloody hematoma / laceration on her scalp area," a bloody laceration on the right side of her forehead, "bite marks on both of her exposed shoulders," facial bruising, and body bruising. (Id. ¶ 71; see Ex. A, id.) Officer Martinez told Scherer that she needed an ambulance because she was "really beat up." (Id. ¶ 70.) On the other hand, Bravo possibly had a "tiny scratch under his chin." (Id. ¶ 77.)

The officers then proceeded to investigate the incident. (FAC ¶¶ 70-85.) Officer Martinez and another unidentified officer ascended the stairs and questioned Scherer, while Officer Ismail questioned Bravo below. (See id. ¶¶ 62, 67, 69.) Scherer told Officer Martinez and the other officer that Bravo was not her boyfriend, and was only a friend. (Id. ¶ 69.) She stated that they had "romantic ties" in the past, but that they were not presently "dating." (Id. ¶ 73.) She further told the officers that Bravo had "tried to rape her, and when he was not successful, that he threw her personal items out of his apartment onto the walkway outside of the same, and beat her up badly." (Id. ¶ 72.) Specifically, she told the officers that Bravo hit her ten to fifteen times in the face. (Id. ¶ 73.)

Officer Martinez then descended the stairs to question Bravo about the parties' relationship status. (Id. ¶¶ 75-76.) Officers Ismail, Martinez, and others observed that Bravo had no visible injuries except for the possible scratch on his chin. (Id. ¶ 77.) Bravo told Officers Martinez and Ismail that he had been "dating" Scherer for four months but then changed his answer and said they were "dating" for about a year. (Id. ¶ 79.) When Officer Ismail asked Bravo about "dating" Scherer, he clarified that they "were not now dating." (Id. ¶ 80.)

Officer Martinez walked back to Scherer and asked her if she wanted to "press charges" against Bravo, and she answered "yeah." (Id. ¶ 81.) Officer

Martinez then went back to question Bravo. (Id. ¶ 82.) Bravo denied hitting Scherer and stated that she "threw the first blow," and hit him with "flailing arms." (Id. ¶ 85.) Officer Martinez seemed to doubt this statement, stating: "Dude, she's pretty beat up." (Id.) Officer Martinez told Bravo that because there was no "dating relationship," the incident was a battery. (Id. ¶ 86.) Bravo expressed that he did not want to press charges. (Id.)

Then, Officer Martinez returned to Scherer and told her: "Just like you, he has injuries too, and he's claiming that you were the aggressor, and that you started the fight, and that just like I told you that you have the right to do a private person's arrest, that he has that right too. So if he wants to press charges, you will be going to jail too." (Id. ¶ 87.) Scherer responded that she did not want to go to jail, but Officer Martinez "told [her] that she would be going to jail right now." (Id. ¶ 88.)

Officer Martinez deliberately did not tell Scherer that Bravo already confirmed that he would not press charges. (Id. ¶ 91.) He omitted this fact in an effort to convince her "not to exercise her right to complain to the police to have Bravo arrested and jailed for beating her up." (Id.) She alleges that Officer Martinez "essentially convinced" her that if she chose to press charges against Bravo, they would both go to jail. (Id. ¶ 90.) It is not clear whether Scherer ultimately decided to "press charges," but eventually Bravo was criminally convicted for domestic violence under Cal. Penal Code § 273.5.[1] (Id. ¶ 99.)

2. *Procedural Background*

On January 13, 2023, Scherer filed her First Amended Complaint. (FAC.) It asserted 3 causes of action: (1) violation of First Amendment right to petition government for redress of grievances, under 43 U.S.C. § 1983, against Officers Ismail, Martinez, and DOES 1 through 6; (2) violation of right to substantive due process of law, under 42 U.S.C. § 1983, against Officers Ismail, Martinez, and DOES 1 through 6; and (3) municipal liability for violation of First Amendment right to petition government for redress of grievances, under 42 U.S.C. § 1983 and Monell, against the City. (Id.)

[1] People v. Maxwell Bravo, No. LAV1VW01547-01.

On May 10, 2023, this Court granted Defendants' motion to dismiss the FAC in its entirety, without leave to amend. (Order, Dkt. No. 39.) Scherer then appealed this decision to the Ninth Circuit. (Notice of Appeal, Dkt. No. 41.) In November 2024, the Ninth Circuit reversed and remanded the decision, and held that this Court erred in dismiss Scherer's First Cause of Action for First Amendment right to press charges under 42 U.S.C. § 1983.[2] (Memorandum, Dkt. No. 51; see also Mandate, Dkt. No. 52.) Specifically, the Ninth Circuit stated:

> Taking the facts in the light most favorable to Scherer, Officer Martinez's statement to Scherer that her attacker, Max Bravo, had the right to press charges; that if Bravo pressed charges "you're going to go [to jail]" right now; and "[t]hat's how private persons arrest works" would have chilled a person of ordinary firmness from exercising the First Amendment right to press charges. Contrary to the district court's conclusion, Scherer has plausibly alleged that Martinez's statement that Scherer would go to jail too was a threat, not a statement of law, given that Bravo had already told Officer Martinez that he did not want to press charges, and that California law requires officers to discourage the dominant aggressor (in this case, Bravo) from pressing charges, even if he had expressed a wish to do so. Cal. Penal Code § 13701(b).

(Id. at 2.) The Circuit court further stated: "On remand, the district court may address, in the first instance, whether the officers are entitled to qualified immunity because Scherer failed to allege a violation of a 'clearly established' constitutional right." (Id. at 2-3 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).)

The Court now addresses whether Officers Ismail and Martinez are entitled to qualified immunity.

## II. LEGAL STANDARD

The doctrine of qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as

[2] The Ninth Circuit noted that Scherer did not challenge the dismissal of her substantive due process or Monell claims. (Memorandum, at 2 n.1.)

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity shields an official even if the conduct resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law. . . . [If] officers of reasonable competence could disagree on th[e] issue [of whether a chosen course of action is constitutional], immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

The Ninth Circuit applies a two-pronged inquiry to resolve claims of qualified immunity. First, the Court determines whether the officer's conduct violated a constitutional right. Robinson v. York, 566 F.3d 817, 821 (9th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). Second, the Court must determine whether the constitutional right at issue was "clearly established in light of the specific context of the case" at the time of the events in question. Mattos v. Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (citing Robinson, 566 F.3d at 821). While the Saucier sequence is often appropriate, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, 555 U.S. at 236.

A right is clearly established if "a reasonable officer would recognize that his or her conduct violates that right under the circumstances faced, and in light of the law that existed at that time." Kennedy v. City of Ridgefield, 439 F.3d 1055, 1065–66 (9th Cir. 2006); see also Saucier, 533 U.S. at 202. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). A case need not be directly on point, but existing binding or persuasive precedent "must have placed the statutory or constitutional question beyond debate." Mattos, 661 F.3d at 442 (quoting al-Kidd, 131 S. Ct. at 2083); see Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (permitting use of persuasive authority). The plaintiff has the burden of establishing that constitutional right was "clearly established" at the time of the alleged violation. Clairmont v. Sound

Mental Health, 632 F.3d 1091, 1109 (9th Cir. 2011).

## III. DISCUSSION

Because the Ninth Circuit clearly established that Officer Martinez's statements to Scherer violated her constitutional right, the first prong of the qualified immunity analysis is met. See Robinson, 566 F.3d at 821 (citing Saucier, 533 U.S. at 201).[3] Thus, the Court addresses only the second prong of the analysis: whether the constitutional right at issue was "clearly established in light of the specific context of the case" at the time of the events in question. Mattos, 661 F.3d at 440 (citing id.).

The parties provide different interpretations of the constitutional violation in this case. Consequently, the Court begins its analysis by defining the constitutional violation at issue.

Defendants claim that the alleged constitutional violation "hinges on Officer Martinez's statement that both Scherer and Bravo had the right to conduct a private person's arrest, and that if Bravo asserted this right, the officers would bring Scherer into physical custody for booking, which is generally how the California private persons arrests statutes work. (Penal Code Sections 242 and 837.)" (Defendants' Br., at 7.) Thus, Defendants frame the relevant question as: "whether it is well-settled that an officer's assertion that he will arrest the 'secondary' aggressor if the primary aggressor chooses to conduct a private person's arrest, violates the secondary aggressor's First Amendment rights." (Id. at 8.) In contrast, Scherer asks: whether "at the time of the incident, on October 31, 2020, the law was clearly established such that every reasonable officer would know that implied threats of arrest would chill a person of ordinary firmness from pressing charges against an attacker." (Scherer's Br., at 14.) Kennedy, 439 F.3d at 1065-66.

[3] This is consistent with the Court's previous finding that Scherer "exercised [her] right [to petition for grievance] when she informed Officer Martinez she wanted to 'press charges,'" and that "her verbal request constitutes protected petitioning activity." (Order, at 8; See Scherer's Br., at 16.)

The Court agrees with Scherer's framing of the constitutional violation. Specifically, the Ninth Circuit found that "Officer Martinez's statement to Scherer that her attacker, Max Bravo, had the right to press charges; that if Bravo pressed charges 'you're going to go [to jail]' right now; and '[t]hat's how private persons arrest works'" violated Scherer's First Amendment right to press charges. (Memorandum, at 2.) Further, the Ninth Circuit found that "Martinez's statement that Scherer would go to jail too was a threat, not a statement of law . . ." (Id.) Thus, Defendants' claim that the constitutional violation involves Officer Martinez's explanation of the California private persons arrests statutes directly contradicts the Ninth Circuit's finding. (Defendants' Br., at 7.)[4] Further, the Court disagrees with Defendants' focus on primary and secondary aggressors. (Id. at 8.) Specifically, the FAC alleges that Scherer was a victim, and not a "secondary aggressor." (See FAC ¶¶ 93, 95.) The Court declines to resolve this factual dispute at the pleadings stage. (See Scherer's Br., at 20-21.) Consequently, construing these allegations as true, the relevant constitutional violation is Officer Martinez's[5] threats to arrest Scherer when faced with her pressing charges. Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted).

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[4] Defendants also argue that "Bravo never waived his right to make a private person's arrest, in writing, and could have changed his mind and elected to place Plaintiff under arrest, as well." (Defendants' Br., at 1.) According to Defendants, had Bravo chose to do so, Officer Martinez would have been required by California law to inform Scherer that she was being arrested too. (Id. at 2.) However, this argument does not contradict the fact that the Ninth Circuit found the FAC properly alleged that Officer Martinez's statement was a threat. Thus, the Court declines to re-litigate this issue at this time.

[5] Defendants claim that the Court need only determine whether Officer Martinez is entitled to qualified immunity because "the Ninth Circuit's memorandum opinion fails to indicate Plaintiff has stated a claim against Officer Ismail." (Defendants' Br., at 1.) Specifically, Defendants claim that the FAC does not "identify any conduct or words on the part of Officer Ismail which plausibly violated the First Amendment." (Id.) The Court finds that its qualified immunity analysis, as discussed below, applies equally to Officer Martinez and Officer Ismail. Paragraph 98 of the FAC alleges that Officer Ismail was "present and aware of" Officer Martinez's statements and he "had a duty, an opportunity and the ability to have intervened and to have stopped Officer Martinez' violation of [Scherer]'s First Amendment right to petition." (FAC ¶ 98; Defendants' Br., at 3; Scherer's Br., at 13 n.4.) Thus, the Court declines to exclude Officer Ismail from the qualified immunity analysis at this time.

The Court now asks whether a reasonable officer would have known that a threat of arrest in the particular circumstance violated Scherer's First Amendment right to petition. The Court finds that the answer is "yes."

First, Scherer argues that, at the time of the incident, "it was clearly established in this Circuit that the reporting of a crime to police is protected 'petitioning' activity under both federal and California state law." (Scherer's Br., at 14.) The Court agrees. For example, in Entler v. Gregoire, the Ninth Circuit held that "the filing of criminal complaints falls within the embrace of the First Amendment." 872 F.3d 1031, 1043 (9th Cir. 2017) (citing Meyer v. Bd. of Cnty. Comm'rs of Harper Cnty., Okla., 482 F.3d 1232, 1235, 1243 (10th Cir. 2007) (finding that the plaintiff had a First Amendment right to file a report against her prior romantic partner for physical assault, and stating: "denying the ability to report physical assaults is an infringement of protected speech")). Similarly, in Chabak v. Monroy, the California court of appeals held that a female student's reports to authorities that she was being sexually abused constituted protected petitioning activity. 154 Cal.App.4th 1502, 1512 (2007). Finally, in Comstock v. Aber, a plaintiff's "complain[t] to the police" that defendant had sexually assaulted her was protected activity under her right to petition. 212 Cal.App.4th 931, 942 (2012).

Additionally, Scherer states that "no reasonable officer could dispute" that Scherer, and not Bravo, was the victim of domestic violence. (Scherer's Br., at 15.) The Court agrees that, taking the FAC's allegations as true, Bravo was clearly the primary aggressor of the incident. Consequently, as the victim of a crime, Scherer had a clearly established First Amendment right to petition the officers by asking to "press charges" against Bravo. (See id.) Thus, in light of the existing law, "a reasonable officer would recognize" that Scherer was exercising her First Amendment right when she stated that she wanted to press charges. (See id.) Kennedy, 439 F.3d at 1065–66.

Because the Court finds that the right to petition is clearly established in the circumstances of this case, the only remaining question is whether a reasonable officer in the same circumstance would know that telling Scherer that she would go to jail if Bravo pressed charges would violate that First Amendment right. The

Court finds that a reasonable officer would have known that such a threat of arrest would chill Scherer from exercising her right to press charges.

First, the Ninth Circuit has clearly established that a threat of retaliation can chill speech. For example, in Brodheim v. Cry, the circuit court found that a prison appeals coordinator's warning to "be careful what you write" on an interview request form may have chilled a reasonable person from filing grievances. 584 F.3d 1262, 1266, 1272 (9th Cir. 2009). The court further held that "the threat itself can have a chilling effect," regardless of if that threat is carried out. Id. at 1270. Additionally, it is clearly established that threats of lawful action fall under this standard if the threat is undertaken in an attempt to chill protected speech. For example, in White v. Lee, the Ninth Circuit found that a HUD investigation, which ultimately resulted in no criminal or civil sanctions, would have chilled a reasonable person from engaging in protected activity. 227 F.3d 1214, 1228-29 (9th Cir. 2000). The court explicitly stated: "Informal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation, can violate the First Amendment also." Id. at 1228 (internal quotations and citation omitted); see also Mulligan v. Nichols, 835 F.3d 983, 989 (9th Cir. 2016).

Second, binding precedent has clearly established that arrest can chill speech. See Lacey v. Maricopa Cnty., 693 F.3d 896, 916-17 (9th Cir. 2012) (holding that the defendant was not entitled to qualified immunity for investigating and arresting the plaintiff in retaliation for his First Amendment speech). Further, Courts in this circuit have interpreted this to mean that *threats* of arrest can also "chill a person of ordinary firmness from continuing to exercise his First Amendment rights." Tabi v. Baker, No. 8:20-CV-00323-VBF-JC, 2022 WL 3162203, *5 (C.D. Cal. Feb. 2, 2022), report and recommendation adopted, No. 8:20-CV-00323-VBF-JC, 2022 WL 3155049 (C.D. Cal. Aug. 8, 2022)[6] (pooling prior cases which stand for the proposition that threat of arrest chills First Amendment rights); Doe v. City of San Diego, 198 F.Supp.3d 1153 (S.D. Cal. 2016) ("threat of arrest[] chills the exercise of First Amendment rights") (citing The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989)).

[6] Although this case was decided after the incident in question, the cases that it summarizes were decided before the incident.

Thus, it is clearly established that threats of arrest can chill a reasonable person from exercising her First Amendment rights.

Defendants argue that these authorities are too general to prove that the Officer's specific conduct is clearly established in this particular case. (Defendants' Br., at 9-10.) While the Court acknowledges that there is no case with precisely the same facts as the one at issue here, this is not the correct standard. (See Scherer's Br., at 17.) Scherer need only demonstrate that the existing case law placed Defendants' actions "beyond debate." Mattos, 661 F.3d at 442 (quoting al-Kidd, 131 S. Ct. at 2083). (See id.) Thus, in the circumstances of this case, and in light of existing case law, any reasonable officer would have understood that telling Scherer she would be arrested should Bravo press charges would chill Scherer from exercising her clearly established First Amendment right to press charges. Consequently, the Officers are not entitled to qualified immunity. Kennedy, 439 F.3d at 1065-66.

## IV. CONCLUSION

For the foregoing reasons, the Court finds that Officers Martinez and Ismail are not entitled to qualified immunity regarding Scherer's 42 U.S.C. § 1983 claim for her First Amendment right to press charges. Scherer may proceed with this claim as alleged in her FAC.

**IT IS SO ORDERED.**